

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RAY SPENCER,

Defendant-Appellant.

UNPUBLISHED

January 2, 2001

No. 213599

Monroe Circuit Court

LC No. 97-028388-FC

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury of carjacking, MCL 750.529a; MSA 28.797a, armed robbery, MCL 750.529; MSA 28.797, kidnapping, MCL 750.349; MSA 28.581, felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.242(2). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent prison terms of twenty to forty-five years each for the armed robbery and kidnapping convictions, and forty to sixty months' imprisonment for the felon in possession of a firearm conviction, to be served consecutive to a twenty-five to forty-five year prison term for the carjacking conviction and a two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion by failing to complete a full in camera review of prosecution files from another county to determine whether they contained exculpatory evidence, and by ruling that only information the prosecution planned to use at trial was discoverable. Further, defendant argues that defense counsel was ineffective for failing to make appropriate objections to these lapses. We review a trial court's decision on an evidentiary issue, including a discovery decision, for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

Under the court rules, the prosecuting attorney must provide a defendant, upon request, with

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial [MCR 6.201(B).]

A defendant has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or innocence. *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996). An in camera review is often utilized to determine whether evidence a defendant seeks is discoverable. *Id.*; see also MCR 6.201(C)(2). In order to establish a due process violation because of the withholding of discoverable materials, the defendant must show:

(1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998).]

Here, the trial court conducted an in camera review of the material in question, although perhaps not a complete review. Defendant has shown, at best, that the material in question might be relevant to his state of mind at the time of the charged offenses. However, defendant has not shown that, had the evidence been available to him, there is a reasonable probability that the result of the trial would have been different. *Fox, supra*. Defendant presented numerous witnesses at trial who testified about his state of mind before and after the charged offenses were committed, as well as his own testimony. Defendant also presented an expert witness, a licensed psychologist, who examined him with regard to the issue of diminished capacity. Defendant does not suggest what the interviews with the other potential witnesses in the ongoing investigation would have revealed about his state of mind that the testimony at trial did not already show. Therefore, defendant has not demonstrated that appellate relief is warranted.

Because there was no *Ginther*¹ hearing, our review of defendant's ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). Here, defense counsel did object to the trial court's handling of the discovery request. Thus, counsel's performance in this matter was not constitutionally deficient. Further, even if counsel could have handled the matter differently, defendant cannot show that the result of his trial would have been different.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

II

Next, defendant argues that the trial court abused its discretion by allowing the jury to be informed of the specific offense of which he was previously convicted, despite an offer to stipulate that he had been convicted only of a specified felony for purposes of the felon in possession of a firearm statute, MCL 750.224f(2); MSA 28.421(6)(2), and was not eligible to possess a gun. Defendant further contends that the trial court compounded its error by failing to give a limiting instruction informing the jury that it could only consider the prior conviction as it related to the felon in possession of a firearm charge, we note that defendant did not request such an instruction.

In *People v Swint*, 225 Mich App 353, 377; 572 NW2d 666 (1997), this Court found that the trial court abused its discretion in denying the defendant's motion to exclude evidence of his prior felony conviction of assault with a dangerous weapon in exchange for a stipulation and plea that the defendant had been convicted of a specific felony and was ineligible to possess a firearm. Relying on *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997), this Court determined that the trial court abused its discretion in refusing to accept the defendant's stipulation. *Swint*, *supra* at 379.

In both *Swint* and *Old Chief*, however, the defendants were trying to keep from the jury the fact that they had previously been convicted of felonies involving the use of a firearm in their prosecutions for felon in possession of a firearm. As the Supreme Court noted in *Old Chief*, "evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case. . . . Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious." *Old Chief*, *supra* at 173.

Here, defendant's prior conviction for criminal sexual conduct was not similar to the pending charges, and the identity of the offense itself did not imply use of a firearm to carry out the offense. Therefore, the risk of unfair prejudice arising from the admission of the evidence is not as strong as in *Swint* and *Old Chief*. Nonetheless, we believe that the trial court abused its discretion by not accepting defendant's offer to stipulate that he had been convicted of a "specified" felony under MCL 750.224f(2); MSA 28.421(6)(2). The crime of which defendant was previously convicted, criminal sexual conduct, carries with it a risk of soliciting the jury's contempt. Given defendant's offered stipulation, there was no need to expose defendant to the risk of unfair prejudice attached to such a conviction.

However, "this preserved, nonconstitutional error was harmless in light of the overwhelming evidence presented at trial." *Swint*, *supra* at 379. "'The defendant's right to a fair trial by jury requires that preserved error be reviewed in terms of its effect on the factfinder.'" *Id.*, quoting *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996). "Thus, 'reversal is only required if the error was prejudicial. That inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.'" *Id.*, quoting *Mateo*, *supra* at 215.

In this case, defendant acknowledged producing a gun and ordering the victim to drive him places. Thus, the evidence was uncontroverted that defendant was in possession of a firearm

and used that weapon in committing the instant offenses. Defendant's posture at trial was not that he did not possess a firearm, but that he suffered from diminished capacity and, therefore, was not responsible. Further, when the court inquired if defendant requested CJI2d 4.11, Evidence of Other Offenses—Relevance Limited to Particular Issue, defense counsel replied that the instruction was not needed. In any event, given the weight and strength of the untainted evidence, we conclude that admission of evidence that defendant had been convicted of first-degree criminal sexual conduct does not require reversal of defendant's convictions.

Defendant also contends that trial counsel was ineffective for failing to move to sever his trial for felon in possession of a firearm from the other charged offenses. However, defendant cannot show that he was denied the effective assistance of counsel because, given defendant's acknowledgment that he possessed a firearm, severance would not have affected the outcome of trial. *Pickens, supra*.

III

Next, defendant contends that defense counsel was ineffective because he did not object to the testimony of five law enforcement officers who were involved in locating the victim's vehicle and apprehending defendant on the night of the charged offenses. Defendant contends that this testimony was needlessly cumulative and had an "obviously prejudicial effect." Thus, contends defendant, much of the officers' testimony should have been excluded under MRE 403.

For the most part, the challenged testimony involved a straightforward recitation of the facts surrounding the reporting of the crime, the discovery of defendant's vehicle, and the apprehension of defendant. While we agree that much of the testimony was cumulative, it was not misleading, confusing, or unfairly prejudicial. See MRE 403. Even if counsel could have successfully excluded some of this testimony, defendant has not shown that the failure to do so affected the trial's outcome. Thus, defendant was not denied the effective assistance of counsel on this basis. *Pickens, supra*.

IV

Defendant next contends that the trial court should have granted his motion for a mistrial because the prosecutor introduced evidence of defendant's parole status. The denial of a motion for a mistrial is within the sound discretion of the trial court and absent a showing of prejudice, reversal is not warranted. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

Before trial, the trial court ruled that it would instruct witnesses not to refer to defendant's prior incarceration or parole status, subject to an offer of proof that the evidence was relevant other than to show propensity. After the defense rested, the prosecutor called a rebuttal witness who testified that, just before the instant offenses, defendant had said that he needed to leave the state because he was facing a parole violation for his use of drugs. Defendant moved for a mistrial, arguing that the witness offered no relevant evidence and was called solely to mention defendant's parole status.

The prosecutor maintains that the witness' testimony was relevant to establish a motive for the carjacking, and to rebut defendant's claim that he was so distraught that he did not know

where he was going when he commandeered the victim's vehicle. The prosecution also claims that the questioning of defendant during cross-examination, which led to defendant's acknowledgment that he had an appointment with his parole officer on the day of the offenses, was proper for the purpose of showing that defendant had the clarity of mind on the day he committed the offenses to recall the date and time of his appointment.

The trial court did not abuse its discretion in denying defendant's motion for mistrial. Evidence that defendant knew that he had an appointment with his parole officer on the day he committed the instant offenses and feared that he would be found in violation of his parole had significant probative value to rebut defendant's claim of diminished capacity, and establish motive for the charged offenses. Further, the jury already knew that defendant had a prior felony conviction.

V

Defendant also challenges the trial court's denial of his motion for directed verdict on the kidnapping charge. When reviewing the denial of a motion for directed verdict, we review the record de novo and consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

A person can be convicted of kidnapping if it is proved beyond a reasonable doubt that the person wilfully, maliciously, and without lawful authority forcibly or secretly confined or imprisoned any other person within this state against the other person's will. MCL 750.349; MSA 28.581. "[A]sportation of the victim is a judicially required element of the crime of 'kidnapping by forcible confinement or imprisonment'. . . ." *People v Jaffray*, 445 Mich 287, 298; 519 NW2d 108 (1994). "To establish the element of asportation, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime (unless the underlying crime involves murder, extortion, or taking a hostage)." *People v Green*, 228 Mich App 684, 696-697; 580 NW2d 444 (1998).

Defendant argues that the asportation of the victim in this case was merely incidental to the commission of the other offenses charged in this case, because as soon as the victim left the car, defendant drove off. However, this argument belies the fact that defendant could have taken the victim's cash and ordered him from the car immediately after he pulled out the weapon. Instead, defendant made the victim drive him around for approximately two hours, with the robbery occurring about halfway through the incident and the carjacking near the very end. The evidence was sufficient to enable a rational trier of fact to find that the element of asportation was established beyond a reasonable doubt. The trial court properly denied defendant's motion for a directed verdict on the kidnapping charge.

VI

Next, defendant contends that the trial court abused its discretion by providing the jury with a written copy of the elements of each charged offense without also providing a written instruction on diminished capacity.

MCR 2.516(B) provides, in pertinent part:

(4) While the jury is deliberating, the court may further instruct the jury in the presence of or after reasonable notice to the parties.

(5) Either on the request of a party or on the court's own motion, the court may provide the jury with

* * *

(c) a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided.

If it does so, the court must ensure that such instructions are made a part of the record.

After the jury in this case retired to deliberate, they sent out a note asking, "Please list the elements of the counts which must be considered." The jury returned to the court room, and the court asked the foreperson what was meant by the word "list." The foreperson responded, "We were under the impression that you might have some paper that would give us a reference to the elements as you listed them to us." The court asked, "Do you request that?," and the foreperson responded, "Yes."

In *People v Parker*, 133 Mich App 358, 362; 349 NW2d 514 (1984), the trial court provided the jury with supplemental written instructions, which the jury had requested, but did not provide a written self-defense instruction, which the jury had not requested. This Court found no error because "[t]he court's instructions were responsive to the jury's request and not misleading in any way. The defendant was not prejudiced by the failure to repeat the instructions on self-defense." *Id.* Similarly, in *People v Bonham*, 182 Mich App 130, 134; 451 NW2d 530 (1989), the defendant contended that the trial court erred in providing the jury with a supplemental written copy of instructions regarding the elements of two offenses, which the jury requested, without also providing supplemental instructions on the intoxication defense, which the jury did not request. Again, this Court found that "[t]he court's instructions were responsive to the jury's request, were not misleading and did not prejudice defendant." *Id.* at 134-135.

Here, the jury was appropriately verbally instructed on defendant's theories of diminished capacity and lack of criminal responsibility. Further, before reinstructing on the elements of the charged offenses, the court reminded the jury, "All of these, every single one, is important and if I give you these and read only from these, please, it would not be fair for you to stress some and ignore the others so you must consider all the instructions." After the second reading of the instructions on the elements of the charged offenses, but before supplying partial written

instructions, the court again stated, “Again, jurors, it will take us awhile to bring those in and again let me tell you again that all of the instructions are important. I’ve given you what you asked for but you may not ignore any other instructions because together they are the law in the case.”

Considering that the written supplemental instructions were in direct response to a jury request, and given the court’s care in instructing the jury that they were to consider all of the original instructions, we find no error. The supplemental instructions were responsive to the jury’s request, they were not misleading, and they did not prejudice defendant in that his theories of the case were sufficiently presented to the jury. *Bonham, supra*; *Parker, supra*.

VII

Next, defendant argues that there was insufficient evidence to support the jury’s determination that he was not suffering from diminished capacity at the time of the charged offenses. He argues that the prosecution did not prove the specific intent element of the charges because the evidence showed that, at the time he committed the charged offenses, he was intoxicated with drugs and alcohol, was suffering from severe sleep deprivation, had not eaten for at least one day, and was emotionally distraught over the recent death of a friend. Defendant contends that there was no competent evidence that he was functioning in his right mind at the time he committed the offenses.

When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). “[I]n order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur”² *People v Gould*, 225 Mich App 79, 85; 570 NW2d 140 (1997), quoting *People v Lerma*, 66 Mich App 566, 569; 239 NW2d 424 (1976).

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded that the essential element of intent was proven beyond a reasonable doubt. There was evidence that defendant appeared normal before he got into the victim’s car, that he acted purposefully in purchasing the gun and ammunition, that he wore gloves in the restaurant to avoid leaving fingerprints, that he told the victim to watch his speed so as not to draw attention when a police car was around, and that he directed the victim where to drive. Further, although the defense expert testified that defendant’s judgment was affected at the time of the instant offenses, he did not testify that defendant could not form the requisite intent, and the prosecution expert opined that defendant was not suffering from diminished capacity. From this evidence, a

² Neither party challenges the trial court’s instruction that the offense of carjacking requires specific intent. This Court has ruled that carjacking is a general intent crime. *People v Davenport*, 230 Mich App 577, 580-581; 583 NW2d 919 (1998). As such, a finding of diminished capacity would not be a defense to this charge. See *People v Biggs*, 202 Mich App 450, 454; 509 NW2d 803 (1993).

rational factfinder could conclude that defendant knew what he was doing and was in control of his conduct sufficiently to form the specific intent to commit the instant offenses.

VIII

Finally, defendant argues that the sentences imposed by the trial court are disproportionate because he suffered from severe substance abuse, was seriously impaired at the time of the incident, and inflicted no physical injury on anyone. We review the sentences imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997); *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). A sentencing court abuses its discretion when it violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentencing court “does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when the offender’s underlying felony, in the context of previous felonies, evinces the defendant’s inability to conform his conduct to the laws of society.” *Reynolds, supra*.

Defendant was sentenced within the statutory limits. Further, his actions in committing these offenses, coupled with his previous criminal record, demonstrate that he is unable to conform his conduct to society’s laws. We conclude, therefore, that the sentencing court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck